MOTION FILED

JAN 8 1998

No. 97-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PENNSYLVANIA BOARD OF PROBATION AND PAROLE,

Petitioner,

vs.

KEITH M. SCOTT,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole?

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PENNSYLVANIA BOARD OF PROBATION AND PAROLE,

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vs.

KEITH M. SCOTT,

Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petitioner. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The Pennsylvania Supreme Court excluded the evidence in this case despite a valid, voluntary consent to search. This holding will unduly hamper the supervision of parolees and result in the unnecessary exclusion of valid, probative evidence. This is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

January, 1998

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

SUMMARY OF FACTS AND CASE

In 1982, Keith M. Scott pled *nolo contendere* to third degree murder.[1] *Scott* v. *Pennsylvania Bd. of Probation*, 698 A. 2d 32, 32 (Pa. 1997). He "was sentenced to a ten to twenty year term of imprisonment." *Ibid.* After he finished the minimum sentence allowed, he was given the opportunity to be released on parole. *Ibid.* If released on parole, he would be subject to certain conditions. *Ibid.* One of these conditions allowed the warrantless search of his person, property or residence. *Ibid.* On September 1, 1993, Scott accepted these conditions and was released on parole. *Scott*, 698 A. 2d, at 32-33. In return, he avoided incarceration for another ten years. See *id.*, at 32.

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

On February 4, 1994, Scott was arrested for a variety of parole violations.[2] *Id.*, at 33. While Scott was being taken to the Monroe County Correctional Facility, two agents went to his residence. *Ibid.* As Scott resided with his mother and stepfather, the agents waited for the return of Scott's mother, who had been notified that the agents were at her house. *Ibid.* After she arrived, she directed the agents to her son's room. *Ibid.* A search of the room revealed no evidence of parole violations. *Ibid.* However, in the adjacent room, the agents found five firearms and a compound bow and arrow. *Ibid.*

A parole violation hearing was held on March 30, 1994. *Ibid.* The evidence seized during the search was admitted, and on June 6, 1994, Scott was recommitted to serve 36 months. *Id.*, at 34. Scott first sought administrative relief from the Pennsylvania Board of Probation and Parole which was denied. *Ibid.* He then appealed to the Commonwealth Court. *Ibid.* The Commonwealth Court reversed and remanded, agreeing with the defense that the evidence seized during the search of Scott's residence violated his Fourth Amendment rights. *Ibid.*

The decision was appealed to the Pennsylvania Supreme Court. *Ibid.* That court, relying on *Commonwealth* v. *Williams*, 692 A. 2d 1031 (Pa. 1997), see 698 A. 2d, at 35-36, held that "when an officer is aware or has reason to be aware of a suspect's parole or probationary status, he must have reasonable suspicion of a parole violation in order to conduct a search. If reasonable suspicion does not exist, the exclusionary rule will apply in the parole revocation hearing." *Id.*, at 38. Applying this rule, the court concluded that the search violated Scott's Fourth Amendment rights and that the exclusionary rule should apply. *Id.*, at 39.

The Pennsylvania Board of Probation and Parole then petitioned this Court for a Writ of Certiorari. The Court granted review limited to question one of the petition on November 26,

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2. The most serious of these violations included possession of a firearm and engaging in "assaultive behavior." *Id.*, at 33.

1997. This question asked whether the exclusionary rule applies to parole revocation hearings. In addition, the Court also requested briefing on this question: "Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole?" *Amicus* CJLF will limit its argument to the second question.

SUMMARY OF ARGUMENT

Well-established principles should not be overlooked in the glare of new trends. An over-reliance on the "special needs" analysis caused the Pennsylvania Supreme Court to sidestep the consent exception. This firmly established exception effectively protects the Fourth Amendment guarantees and should be the analysis used to justify the search. To meet Fourth Amendment requirements, consent simply needs to be voluntary. A review of the facts, case law and analogous situations supports the voluntariness of the consent given by Scott to the Pennsylvania Board of Probation and Parole. The bargain reached between the parties should be given effect.

This analysis should not be disrupted by the extension of the unconstitutional conditions doctrine to the Fourth Amendment. The doctrine finds its roots in the First Amendment and should be limited to that basis. Allowing the doctrine to go beyond its natural boundaries will only harm those it seeks to protect by depriving them of the opportunity for release and will quite literally "imprison a man in his privileges and call it the Constitution." See *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 280 (1942).

ARGUMENT

I. This case can and should be decided on the consent exception.

In the present case, the Pennsylvania Supreme Court held that parolees have "a Fourth Amendment right against unreasonable searches and seizures that is unaffected by his signing of [a] consent to search provision." *Scott* v. *Pennsylvania Bd. of Probation,* 698 A. 2d 32, 36 (Pa. 1997). To reach this conclusion, the court relied on *Commonwealth* v. *Williams*, 692 A. 2d 1031 (Pa. 1997). In *Williams*, the court had concluded that a signed parole provision was a mere acknowledgment that "agents of the Parole Board could conduct a warrantless search of his premises." *Id.*, at 1037. These decisions strip the consent of any true effect and fail to faithfully recognize the body of law supporting the consent exception to the Fourth Amendment.

From these conclusions, the decision then relied on "special needs" principles to determine the legality of the search. This requires balancing governmental interests against the parolee's privacy interests, trying to reach the perfect "middle ground." See *Scott*, 698 A. 2d, at 36. The mixture of consent principles and "special needs" analysis in the decision illuminates a basic misunderstanding of these exceptions and the Fourth Amendment analysis.

The Fourth Amendment guarantees all individuals the right to be free from "unreasonable searches and seizures." U. S. Const., Amdt. 4. Generally, searches conducted without probable cause and a search warrant are *per se* unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357 (1967). "Special needs" is one such emerging exception. See, *e.g.*, *Vernonia School District 47J* v. *Acton*, 515 U. S. 646, 653 (1995); *Griffin* v. *Wisconsin*, 483 U. S. 868, 873 (1987). Another entirely separate, firmly established exception is consent. See, *e.g.*, *Ohio* v. *Robinette*, 519 U. S. ___, 136 L. Ed. 2d 347, 355, 117 S. Ct. 417, 421 (1996); *Florida* v. *Bostick*, 501 U. S. 429, 434 (1991); *Illinois* v. *Rodriguez*, 497

U. S. 177, 179 (1990); *Florida* v. *Royer* 460 U. S. 491, 497 (1983); *United States* v. *Mendenhall*, 446 U. S. 544, 557-560 (1980); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 219 (1973); *Davis* v. *United States*, 328 U. S. 582, 593-594 (1946); *Zap* v. *United States*, 328 U. S. 624, 630 (1946).

Under the "special needs" exception, a search is reasonable only after a balancing of the interests involved justifies the intrusion. For example, in *Vernonia*, *supra*, the search was deemed reasonable after considering "the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search." 515 U. S., at 664-665.

In some circumstances, individualized suspicion may be required to make the search "reasonable" under the Fourth Amendment. See *O'Connor* v. *Ortega*, 480 U. S. 709, 726 (1987) (offices of government employees) (plurality); *New Jersey* v. *T.L.O*, 469 U. S. 325, 342, n. 8 (1985) (school lockers). For example, in *New Jersey* v. *T.L.O.*, the search was conducted only after a teacher suspected the student of violating a school rule. 469 U. S., at 328. However, the "special needs" exception does not always require individualized suspicion. See *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 560-561 (1976) (border patrol checkpoints) ("the Fourth Amendment imposes no irreducible requirement of such suspicion"); see also *Vernonia*, *supra*, 515 U. S., at 664-665 (student athletes); *National Treasury Employees Union* v. *Von Raab*, 489 U. S. 656, 665 (1989) (United States Customs Service employees); *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 618-624 (1989) (railroad employees). Furthermore, in *O'Connor* and *T.L.O.*, the Court deliberately left unanswered what level of suspicion was required to meet constitutional muster absent those particular facts. *O'Connor*, 480 U. S., at 726; *T.L.O.*, 469 U. S., at 342, n. 8. Thus, these cases establish only that the degree of suspicion presented by their facts was sufficient, not that it was necessary.

Similarly, the "reasonable suspicion" standard, in the present case, which stems from a regulation found in *Griffin* v.

Wisconsin, is not required. In *Griffin*, this Court, using a "special needs" analysis, upheld a warrantless probation search. *Griffin*, *supra*, 483 U. S., at 880. A Wisconsin regulatory scheme permitted warrantless searches when a probation officer had "reasonable grounds" to believe the probationer violated probation. See *id.*, at 870-871; see also Wis. Stat. § 973.10(1) (1985-1986); Wis. Admin. Code HHS §§ 328.21(4), 328.16(1) (1981). After recognizing the "special needs" of the probation system justified the departure from the usual warrant and probable cause requirement, the Court concluded the search was " 'reasonable' . . . because it was conducted pursuant to a valid regulation governing probationers." *Griffin*, 483 U. S., at 880. This conclusion does not determine whether the regulation's standard is the minimum standard required.

Just because a state regulatory scheme withstands constitutional attack does not mean the state's scheme is the new standard. For example, under Kentucky law, a defendant can collaterally attack the constitutionality of prior convictions when he is charged as a persistent felony offender. *Parke* v. *Raley*, 506 U. S. 20, 22 (1992). Under Kentucky's procedures, courts use a burden-shifting rule when a transcript of the plea proceeding is unavailable to determine the validity of a prior conviction. See *id.*, at 23-24. The constitutionality of this rule was questioned in *Parke* and this Court concluded that "Kentucky's burden-shifting rule easily passes constitutional muster." *Id.*, at 28. This holding did not create a right to collaterally attack prior convictions. It also did not dictate that the courts that allow attacks must use Kentucky's burden-shifting rule. It simply held Kentucky's method did not violate the Constitution.

The Court subsequently determined in *Custis* v. *United States*, 511 U. S. 485 (1994) that entertaining collateral attacks on prior convictions is not required *at all*, with the exception of *Gideon* claims. *Id.*, at 487. Analogously, *Griffin*'s holding that a "reasonable grounds" regulation "passes constitutional muster" (in *Parke*'s words) does not amount to a holding that "reasonable grounds" are required.

Following a "special needs" analysis would require the Court to address this unanswered question. The Court would also have to consider whether a consent provision is an appropriate starting point for a "special needs" analysis. Basing the analysis on a consent provision is questionable and leads to obviously flawed results. The new rule adopted by the Pennsylvania court illustrates this point.

Under the rule, the parolee's consent is given no real effect. It simply acts as a springboard to get to the "special needs" analysis. Once there, a search will only be deemed reasonable if the parole officer conducting the search has a "reasonable suspicion that the parolee had committed a parole violation." *Scott*, *supra*, 698 A. 2d, at 36. This less-than-probable cause standard is justified by the parolee's lower expectation of privacy and the "special needs" of the parole system. The analysis diminishes the strength that should be given to the parolee's consent and results in additional safeguards protecting parolee's privacy interests. A voluntary consent alone makes a search reasonable for the average citizen. *Robinette*, *supra*, 136 L. Ed. 2d, at 355, 117 S. Ct., at 421 (no additional level of suspicion required beyond the detainee's voluntary consent). However, for a parolee, under the Pennsylvania court's new rule, a search is only reasonable if the parolee voluntarily signs a consent provision *and* the officer has reasonable suspicion for the search. Clearly, this cannot be correct. It makes the level of protection *higher* for parolees than for law-abiding citizens. "Special needs" analysis and consent analysis are distinct and should not be confused. Where both apply, a search is valid if it meets either test.

Recognizing that it is the Court's practice to dispose of claims on the simplest grounds available, *amicus* submits that this case is more simply resolved on consent. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984) ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed"). Under the consent exception, a search is reasonable if the consent justifying the search is

"freely and voluntarily given." *Bumper* v. *North Carolina*, 391 U. S. 543, 548 (1968). This analysis will only require the Court to address the voluntariness of the consent given. Accordingly, this exception will limit the analysis necessary and will avoid the detailed balancing of interests required by the "special needs" exception.

II. The consent analysis justifies the warrantless search of Scott's residence.

A. Voluntary Consent.

Consent will only meet Fourth Amendment requirements if it is voluntary. *Bumper* v. *North Carolina*, 391 U. S. 543, 548 (1968). However, as *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 224 (1973) recognized, there cannot be a "talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen." Rather, "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Id.*, at 227.

In coming to this conclusion, the *Schneckloth* Court rejected more restrictive approaches to the consent analysis. Refusing to adopt a *Miranda*-type approach to these situations, the Court explained that "voluntariness" does not require that an individual's "knowledge of a right to refuse" be demonstrated in order for the consent to be valid. *Id.*, at 234. The Court also rejected a "strict standard of waiver" approach, see *id.*, at 241, recognizing that the "protections of the Fourth Amendment are of a wholly different order." *Id.*, at 242. The Court explained that "the Fourth Amendment protects the 'security of one's privacy against *arbitrary* intrusion by the police . . . .' " *Ibid.* (quoting *Wolf* v. *Colorado*, 338 U. S. 25, 27 (1949)) (emphasis added). Since "there is nothing constitutionally suspect in a person's voluntarily allowing a search," the Court refused to require a

"knowing and intelligent" waiver standard for a consent search. *Schneckloth*, 412 U. S., at 243, 246.

Illinois v. *Rodriguez*, 497 U. S. 177 (1990) reinforces the proposition that a strict standard of waiver is not necessary to protect Fourth Amendment guarantees. In *Rodriguez*, the Court was asked to determine "[w]hether a warrantless entry is valid when based upon consent of a third party whom the police, at the time of entry, reasonably believe to possess common authority over the premises, but who in fact does not do so. *Id.*, at 179. The Court explained that the issue "raised is not whether the right to be free of searches has been *waived*, but whether the right to be free of *unreasonable* searches has been *violated*." *Id.*, at 187 (emphasis in original). If the Court had limited its analysis to who actually possessed authority over the premises, the search would have seemingly been unreasonable, as that person did not consent to the search. This result would have given the consent the effect of a waiver, a result the Court has repeatedly rejected. See, *e.g.*, *Schneckloth*, 412 U. S., at 246.

In the present case, the question is not whether Scott validly waived his rights. Rather, the Court must decide if the parole search was reasonable. The consent given by Scott makes this search reasonable, and the voluntariness of the consent ensures the Fourth Amendment guarantees are not violated. Voluntariness is a flexible concept. *Id.*, at 224. It acts as a backdrop that structures the analysis, but only after a "careful sifting of the unique facts and circumstances" will its presence be revealed. *Id.*, at 233.

Davis v. *United States*, 328 U. S. 582 (1946) is an example of the type of analysis courts should engage in to determine whether a search was made pursuant to a valid consent. *Davis* involved the consensual search of an office for gasoline ration coupons. See *id.*, at 586-587. The petitioner was convicted of unlawful possession of gasoline ration coupons after the District Court concluded that "the petitioner had consented to the search and seizure and that his consent was voluntary." *Id.*, at 587.

The Court of Appeal affirmed, basing its decision on a "search incident to arrest" rationale. *Ibid.* The Supreme Court returned to the consent analysis, finding it unnecessary to reach the alternative analysis engaged in by the Court of Appeals. *Id.*, at 594.

In evaluating the voluntariness of the consent, the Court looked to the totality of the circumstances surrounding the search. The Court relied on the "public character of the property, the fact that the demand was made during business hours at the place of business where the coupons were required to be kept, the existence of the right to inspect, the nature of the request, [and] the fact that the initial refusal to turn the coupons over was soon followed by acquiescence in the demand" to support the conclusion that the consent was voluntarily given. *Id.*, at 593. The Court further explained that "[t]he nature of the coupons is important here merely as indicating that the officers did not exceed the permissible limits of persuasions in obtaining them." *Id.*, at 591. The Court relied on the fact that the circumstances drove the choice rendered by Davis, not the actions of the officers.

Davis chose to engage in the gasoline business during World War II, when gasoline was scarce, strategically important, and strictly rationed. As part of his business, he had public documents that were required to be turned over to the government. *Id.*, at 588-589. Yet he still chose to go into that business. Davis may have wanted different options. For example, he may have wanted to have free rein to do as he pleased with his gasoline business. However, the circumstances did not allow this. Even with the contraints on his choice, the Court concluded he could consent to the search for ration coupons, *id.*, at 587, 593-594, a consent the Court deemed voluntary. *Id.*, at 593-594.

Scott, like Davis, had a choice. Just as Davis agreed to give up some of his privacy to work in the gasoline business, Scott agreed to give up some of his privacy to gain parole. Just like Davis, Scott's choice was not free from constraints. He may

have wanted different options. However, the circumstances did not allow this. The circumstances inevitably drove his choice. This does not effect his ability to voluntarily consent. This review of the bargain struck between Scott and the probation board reveals the voluntariness of the parolee's consent and the absence of a Fourth Amendment violation.

B. Precedent Supports the Voluntariness of the Bargain Reached.

This Court's precedents further support the voluntariness of the bargain reached between Scott and the probation board. The Court has recognized an individual's ability to consent in advance to warrantless searches, *Zap* v. *United States*, 328 U. S. 624 (1946), and also to voluntarily agree to a bargain that provides only two undesirable options. *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363 (1978). These holdings further demonstrate that the consent given by Scott to the warrantless search of his property was voluntary and thereby reasonable under the Fourth Amendment.

Zap remains valid authority for the consent exception, see, *e.g.*, *Vale* v. *Louisiana*, 399 U. S. 30, 35 (1970), and should control the outcome of the present case. In *Zap*, the Court upheld the search of an individual's business based on a previously obtained consent. Zap had entered into a contract with the Navy "under which he was to do experimental work on airplane wings and to conduct test flights." *Zap*, 328 U. S., at 626. The contract required that "[t]he accounts and records of the contractor shall be open at all times to the Government and its representatives . . . ." *Id.*, at 627. In 1942, Zap's books and records were audited by agents of the Federal Bureau of Investigation. *Ibid.* These agents acted pursuant to the Navy Department's authority. *Ibid.* From this audit, the agents recovered a check for $4,000, *ibid.*, made out to a test pilot, that was used by Zap to defraud expense money from the government. *Id.*, at 626. Zap moved to have the check "stricken on the ground that it had been illegally seized." *Id.*, at 628. The Court concluded that "[t]he search and the discovery were

wholly lawful" relying on the petitioner's consent. *Id.*, at 630. The Court explained that "when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had . . . ." *Id.*, at 628.

Under *Zap*, the consent to warrantless searches agreed to by Scott made the search reasonable under the Fourth Amendment. Like Zap, Scott was not required to accept the government's contract. He was simply given the option. Zap chose to accept the contract and its condition in order to receive the Navy's business. Scott, likewise, chose to accept the parole board's contract and conditions to avoid serving the remainder of his sentence inside prison. The bargain struck between the Navy and Zap was given effect. The bargain between Scott and the probation board should be given similar effect.

This Court has long recognized the validity of mutually beneficial consents and should continue to give individuals the benefit of their bargains. See, *e.g.*, *Ruckelshaus* v. *Monsanto*, 467 U. S. 986, 1007 (1984) (the Court concluded that "a voluntary submission of the data by an applicant in exchange for the economic advantages of a registration" did not violate the Taking Clause of the Fifth Amendment); *Bordenkircher*, 434 U. S., at 363. The plea bargain is particularly analogous to the present situation. As the validity and voluntariness of plea agreements have long been recognized by the Court, *Bordenkircher*, 434 U. S., at 363, this analogy is persuasive evidence that the bargain struck between Scott and the probation board was consensual.

Plea bargains come in the face of substantial state power, and the defendants are often faced with dire possibilities if they go to trial. Yet this Court has affirmed that the valid consent necessary for a bargain can be obtained. A plea agreement is even recognized as "an essential component of the administration of justice . . . . [and] is to be encouraged." *Santobello* v. *New York*, 404 U. S. 257, 260 (1971).

"Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Bordenkircher*, 434 U. S., at 363. This mutual advantage supports the consensual character of the plea agreement. The *Bordenkircher* facts further illuminate this point. In *Bordenkircher*, the prosecution threatened to charge the defendant as an habitual criminal if he did not " 'save the court the inconvenience and necessity of a trial.' " *Id.*, at 358. As a habitual criminal, the defendant could receive a life sentence. *Id.*, at 358-359. If he accepted the plea agreement and pled guilty to the crime charged, the sentence would only be two to ten years in prison. *Id.*, at 358. When defendant refused to accept the bargain, the prosecutor carried out his threat, and defendant was convicted and received a life sentence. *Id.*, at 359. This Court upheld the sentence, allowing prosecutors to present defendants with such "unpleasant alternatives . . . ." *Id.*, at 365. This "acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process." *Id.*, at 363.

Scott was given two alternatives: remain in prison or accept the parole conditions. Neither alternative is pleasant. However, like the plea-bargaining defendant, a prisoner can choose between the two alternatives, and this choice is voluntary.

III. The doctrine of unconstitutional conditions should be limited to the First Amendment, leaving the consent analysis undisturbed.

The only potential threat to the applicability of the consent exception to these facts would be the extension of the unconstitutional conditions doctrine to the Fourth Amendment. The unconstitutional conditions doctrine instructs that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . ." *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972). If this doctrine were